Nos. 14-840, 14-841

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In The
Supreme Court of the United States

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,
Respondents.

ENERNOC, INC., *et al.*,
Petitioners,
v.
ELECTRIC POWER SUPPLY ASSOCIATION, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

AMICUS CURIAE BRIEF OF CES AND DR. SILKMAN IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici Curiae Competitive Energy Services, LLC ("CES") and Richard Silkman ("Dr. Silkman") submit this brief in support of Respondents.* CES and Dr. Silkman submit this brief not to dissect the details of demand response programs, but simply to underscore through their own experience the conclusion of the court below that the rationale of the Federal Energy Regulatory Commission ("FERC" or "Commission") knows no limiting principle – under the guise of asserting jurisdiction over anything that might "directly affect" wholesale energy prices, FERC can, and will, regulate everything and everyone.

CES provides energy consulting and other services to clients, and Dr. Silkman is a managing member of CES. CES advised Rumford Paper Company ("Rumford") concerning its participation in a demand response program in which Rumford received payment in exchange for not making retail electricity purchases. Not content to assert jurisdiction over Rumford for its program participation, FERC also asserted jurisdiction and eventually filed a still-pending lawsuit against CES and Dr. Silkman. *Federal Energy Regulatory Commission v. Richard Silkman and Competitive Energy Services, LLC*, Case No. 1:13-cv-13054-DPW (D. Mass.) ("*CES Lawsuit*").

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* No counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

CES and Dr. Silkman thus have an interest in demarcating the outer boundary of the Commission's authority.

SUMMARY OF ARGUMENT

Everyone agrees that FERC has jurisdiction over the wholesale energy market, and that States have jurisdiction over the retail energy market. FERC argues that it should also have jurisdiction over practices that "directly affect" the wholesale energy market even if they concern the retail energy market. The court below concluded that FERC's rationale knew no limiting principle, and could expand FERC's reach to include the steel, fuel, and labor markets. FERC argues to this Court that the D.C. Circuit's concerns are overblown. Not so.

CES had a consulting agreement with Rumford advising it concerning its participation for six months in 2007-2008 in a demand response program, for which CES was paid a total of $166,841.13. Dr. Silkman is a managing member of CES, but he did not have a separate agreement with Rumford and was not separately compensated. After the demand response program was suspended and restructured in 2008 due to what FERC itself called a "flaw" in the program, FERC targeted CES and Dr. Silkman in a lengthy investigation, requiring them to provide voluminous documents and give testimony in Washington, DC. FERC not only asserted jurisdiction over

CES and Dr. Silkman for advising Rumford concerning its retail electricity purchases, but FERC proposed civil penalties of $7,500,000 for CES (and disgorgement of their consulting fees) and $1,250,000 for Dr. Silkman for alleged violation of a FERC statute and a FERC rule. CES and Dr. Silkman vigorously disputed both the Commission's jurisdiction and conclusions, so, in 2013, FERC filed suit in federal court seeking *de novo* review of its conclusions. The motion to dismiss filed by CES and Dr. Silkman has been pending for over two years.

Although the *CES Lawsuit* founders on many shoals, its mere existence stands as a ringing rebuke to FERC's refrain that this is not the proverbial camel's nose under the tent. In that case, FERC claims that its jurisdiction reaches not only companies that forego retail purchases of electricity, but also extends to consultants and their individual members who advise such companies. The D.C. Circuit got it right – there is *no* limiting principle to FERC's assertion of authority over anything or anyone that may "directly affect" the wholesale energy market.

ARGUMENT

FERC CONTENDS THAT ITS AUTHORITY EXTENDS NOT ONLY TO COMPANIES THAT MAKE RETAIL ELECTRICITY PURCHASES, BUT ALSO TO CONSULTANTS AND THEIR MEMBERS WHO ADVISE SUCH COMPANIES.

Introduction. No one disputes that FERC has jurisdiction over "the sale of electric energy at wholesale in interstate commerce." FERC Br. at 4 (quoting 16 U.S.C. § 824(b)(1)); *accord Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216, 219 (D.C. Cir. 2014) (*"EPSA"*); *see also New York v. FERC*, 535 U.S. 1, 19 (2002) ("FERC's jurisdiction over the sale of electricity has been specifically confined to the wholesale market."). Likewise, FERC does not dispute that it "lacks jurisdiction to regulate retail sales (*i.e.*, sales to users of electricity), which have long been regulated by state utility commissions." FERC Br. at 4 (citing *New York*, 535 U.S. at 17, 23). FERC argues, however, that if any practice "directly affects" wholesale rates, FERC has the authority and duty to regulate that practice "regardless of whether that practice or FERC's regulatory approach also significantly affects the retail market." FERC Br. at 21.

The court below concluded that FERC's proposed jurisdictional standard was a bridge too far. Indeed, it concluded that FERC's proposed "directly affects" standard was no standard at all:

> The Commission's rationale, however, has no limiting principle. Without boundaries,

> §§ 205 and 206 could ostensibly authorize FERC to regulate any number of areas, including the steel, fuel, and labor markets.

EPSA, 753 F.3d at 221. FERC and other parties argue that the *EPSA* court's concerns are "entirely misplaced." FERC Br. at 28; *accord* EnerNOC Br. at 33-34; Joint States' Br. at 19; PJM Br. at 39-40. Unfortunately, the cautionary tale of FERC's seven year and counting pursuit of CES and Dr. Silkman confirms that the D.C. Circuit's fears are spot on.

FERC's Investigation and Prosecution of CES and Dr. Silkman. In the *CES Lawsuit*, FERC alleges that CES provides "energy consulting and other services" to clients and that Dr. Silkman is a "Managing Member" of CES. *CES Lawsuit*, ECF No. 1 (Complaint ¶¶ 35-36). In the Spring of 2007, Dr. "Silkman (on behalf of CES)" recommended to Rumford that it participate in the Day Ahead Load Response Program ("Day Ahead Program") operated by ISO New England, Inc. ("ISO-NE"). *Id.* ¶ 37. Thus, CES is a consultant, and Dr. Silkman is an individual who works for and has an interest in CES.

The Day Ahead Program was a demand response program operated by ISO-NE. *Id.* ¶¶ 2-8, 26-34. The Day Ahead Program allowed "participants to offer electricity reductions for hours in the next day when New England experienced high electricity prices." *Id.* ¶ 4. In exchange, participants were paid for their electricity reductions. *Id.* In other words, participants, such as Rumford, were paid for agreeing *not* to make *retail* purchases of electricity.

Participants like Rumford participated in the program through an "Enrolling Participant," here, Constellation NewEnergy, Inc. ("Constellation"), which registered Rumford, received the daily bids, submitted the daily bids to ISO-NE, collected payments from ISO-NE, and distributed the payments; Constellation was a "middlem[a]n who facilitated communications between [Rumford] and ISO-NE regarding the [Day Ahead Program]." *Id.* ¶ 34 (brackets added). In other words, Constellation was a further intermediary between Rumford and the demand response program.

Rumford participated in the Day Ahead Program "from July 2007 until February 2008." *Id.* ¶¶ 1, 47. CES and Silkman advised and assisted Rumford in connection with Rumford's participation in the program. *Id.* CES received $166,841.13 for its work advising Rumford. *Id.* ¶ 51. Dr. Silkman did not have a separate consulting agreement with Rumford, and did not receive any separate payment from Rumford.

The Complaint repeatedly describes the actions of CES and Silkman as "consulting," "advising," "suggesting," "proposing," "telling," and the like. *Id.* ¶¶ 35, 36, 37, 40, 42, 44 (grammar altered for consistency). The prior orders from the Commission, which are "incorporated by reference in this Petition," *id.* ¶¶ 9, 17, are even more explicit that CES and Dr. Silkman acted as consultants and advisors to Rumford. The Commission begins its discussion by stating Dr. Silkman was a "managing member" of CES, and that CES provided "energy consulting services to Rumford." *CES Lawsuit*, ECF No. 1-3 at 2.

"As relevant here, Dr. Silkman *assisted* Rumford with its participation" in the Day Ahead Program. *Id.* at 2-3 (emphasis added); *see also CES Lawsuit*, ECF No. 1-4 at 2-3 (same assertion concerning CES). Exactly.

On page after page of the prior Commission orders, FERC uses language such as advising, consulting, proposing, and suggesting, which reinforces the conclusion that CES and Dr. Silkman were consultants and advisors to Rumford. *See CES Lawsuit*, ECF No. 1-3 at 2-3, 7-9, 12-13, 20-25, 28-30; ECF No. 1-4 at 3, 7-9, 13-14, 20-25, 28-31; ECF No. 1-5 at 3, 9, 11-12, 15-20; ECF No. 1-6 at 3, 9, 11-12, 14-19. Indeed, the Commission takes CES to task precisely for the consulting role it played in this matter: CES "is an energy consulting company whose expertise entailed that *exact task: advising clients* on how to properly participate in energy-related programs such as the [Day Ahead Program]." ECF No. 1-4 at 25 (brackets and emphasis added).

In February 2008, ISO-NE suspended and restructured the Day Ahead Program due to a fundamental "flaw" in the program. *See ISO New England, Inc.*, 123 FERC ¶ 61,021 at P 25 (2008); *ISO New England, Inc.*, 124 FERC ¶ 61,235 at P 5, 8 (2008). At the same time, FERC opened a number of "confidential" investigations, including investigations of CES and Rumford. *CES Lawsuit*, ECF 1 (Complaint ¶ 52). As part of its investigation of CES, FERC required CES to produce voluminous documents, to respond to numerous interrogatories, and to produce Dr. Silkman

for deposition in Washington, DC. *See id.* In contrast, CES was not permitted to conduct any discovery, or to attend the depositions of any Rumford and Constellation witnesses that FERC took as part of its investigation. Subsequently, FERC opened a separate, but identical, investigation against Dr. Silkman individually. In numerous filings with the Commission, CES and Dr. Silkman argued that FERC's reach did not extend to consultants and their employees (and that their advice to Rumford was entirely proper).

As part of its bankruptcy proceeding, Rumford settled with FERC, agreeing to pay $3,036,419.08, of which $2,836,419.08 consisted of payments Rumford had received under the Day Ahead Program for offering to curtail its retail purchases of electricity. *See Rumford Paper Co.*, 142 FERC ¶ 61,218 at P 26 (2013). The Commission thus agreed to accept $200,000 in civil penalties (approximately 7% of the payments Rumford received) from the company that actually participated in the Day Ahead Program by submitting the bids and receiving payments in exchange for foregoing retail purchases of electricity.

On August 29, 2013, without finding any violation of any rule or regulation governing the Day Ahead Program, the Commission concluded that it had jurisdiction over CES and Dr. Silkman; that their advice violated FERC's market manipulation statute, 16 U.S.C. § 824v, and FERC's Anti-Manipulation Rule, 18 C.F.R. § 1c.2; that CES should disgorge all of the $166,841.13 it had received for advising Rumford; that CES should pay $7,500,000 in civil penalties

(nearly 4500% of the payments it had received); and that Dr. Silkman should pay an additional $1,250,000 in civil penalties. *See CES Lawsuit*, ECF No. 1 (Complaint ¶¶ 60, 62). CES and Dr. Silkman had previously elected to have a federal court conduct a *de novo* review of the Commission's conclusions. *Id.* ¶ 56.

On December 2, 2013, over five years after Rumford stopped participating in the Day Ahead Program, FERC filed suit in the District of Massachusetts against CES and Dr. Silkman (although both are from Maine). *CES Lawsuit*, ECF 1. CES and Dr. Silkman promptly filed a motion to dismiss on December 19, 2013, *CES Lawsuit*, ECF No. 8, and, on June 4, 2014, they filed a motion for judgment on the pleadings after the *EPSA* court issued its ruling below. *CES Lawsuit*, ECF No. 35. Those motions remain pending today.

For present purposes, it suffices to note that FERC contends that its jurisdiction extends to small consulting firms and their members who engage in "consulting," "advising," "suggesting," "proposing," "telling," and the like, for companies that participate through an intermediary in demand response programs concerning their decision to purchase, or not, retail electricity. *See CES Lawsuit*, ECF No. 1 (Complaint ¶¶ 35, 36, 37, 40, 42, 44) (grammar altered for consistency). Indeed, there are almost six degrees of separation between Dr. Silkman and the wholesale energy market regulated by FERC – he is a member of a consulting company (CES), which advises a company (Rumford), which participates through an

intermediary (Constellation), in a demand response program concerning retail electricity purchases managed by ISO-NE, which allegedly has a "direct effect" on the wholesale energy market regulated by FERC. The *CES Lawsuit* demonstrates that the D.C. Circuit's concerns about FERC and its limitless grasp are entirely justified.

Coda. Implicit in FERC's proposed standard to assert jurisdiction over practices that "directly affect" the wholesale energy market is the assumption that it will use its prosecutorial discretion only to pursue appropriate targets, as opposed to the steel, fuel, or labor markets. It is, however, a cornerstone of our system that "[t]he government of the United States has been emphatically termed a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (brackets added). Moreover, recent experience proves that prosecutorial discretion provides an insufficient barrier to potential government overreach. *Cf. Bond v. United States*, 134 S. Ct. 2077 (2014) (prosecution under the Chemical Weapons Convention Implementation Act for spreading chemicals that might cause a rash on the car door, mailbox, and door knob of the paramour of the defendant's husband); *Yates v. United States*, 135 S. Ct. 1074 (2015) (prosecution under the Sarbanes-Oxley Act for throwing undersized fish overboard).

So, too, here. Prosecutorial discretion has not prevented FERC from pursuing CES and Dr. Silkman for years for giving allegedly incorrect advice and assistance to Rumford concerning its participation in

a flawed demand response program relating to retail electricity purchases, and prosecutorial discretion has not prevented FERC from seeking civil penalties that are nearly 45 times what CES received for its consulting advice and that are nearly 38 times what FERC obtained from the company that actually participated through an intermediary in the demand response program. If FERC's proposed standard has no limiting principle, the Court should not assume that prosecutorial discretion will supply the missing limitation.

CONCLUSION

Amici Curiae Competitive Energy Services, LLC and Richard Silkman request that the Court affirm the judgment below.

Respectfully submitted,

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